Filed 5/3/10 In re J.M. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re J.M., a Person Coming Under the Juvenile Court Law.	
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. G.M. et al., Defendants and Appellants.	C062158 (Super. Ct. No. JD226621)

The parents of the minor appeal from orders of the juvenile court terminating their parental rights. (Welf. & Inst. Code, §§ 366.26, 395.)[1] The mother contends reversal is required because no guardian ad litem was appointed for her at the commencement of the proceedings. The father joins the mother's

[1] Hereafter, undesignated statutory references are to the Welfare and Institutions Code.

argument and also argues the juvenile court abused its discretion in failing to find he had established an exception to the preference for adoption as a permanent plan. We affirm.

FACTS

The newborn child, J.M., was placed in protective custody in November 2007, due to the mother's history of mental illness, which previously resulted in the removal of her two other children, one of whom has been freed for adoption, and the father's anger management issues. The mother's mental illness was being controlled by medication and she was complying with her medication regimen; however, she continued to display cognitive impairment.

In January 2008, the court denied services to appellant due to her failure to make reasonable efforts to treat the problems which led to the removal and termination of parental rights as to her other children. The mother challenged the denial of services in an appeal from the judgment of disposition but did not assert that a guardian ad litem should have been appointed for her. The judgment was affirmed in an unpublished opinion in *In re J.M.* (Nov. 25, 2008, C058009). The juvenile court ordered reunification services for the father.

During the reunification period, both parents regularly visited the child. However, the quality of the visits was questionable due to the father's controlling behavior which prevented normal parent-child interaction and his occasional anger issues. The father failed to reunify and his services were terminated in January 2009.

The assessment for the section 366.26 hearing stated that appellants continued to have regular visitation with the child but both continued to need redirection to engage in age-appropriate interaction with her. The father continued to try to control the visits by making the child eat when she was not hungry and holding her when she did not want to be held. The child was not excited to see appellants, showed no distress upon leaving visits and occasionally wanted to leave visits early. It did not appear that she knew appellants were her parents. The child was described as a normal healthy child with no behavioral or emotional problems and was likely to be adopted by her current caretakers or another family.

At the section 366.26 hearing, the mother testified about the activities during visits and her belief that she had a strong bond to the child. She further testified that the child liked the visits and did not want to leave when they were over. The court found the testimony not credible and, relying on the visitation reports, concluded the relationship between appellants and the child was that of a friendly visitor. Finding the child was likely to be adopted and that no detriment to termination had been established, the court terminated parental rights.

DISCUSSION

I.

The mother contends the court erred in failing to appoint a guardian ad litem for her at the commencement of the proceedings due to her mental illness and cognitive impairment.

"In a dependency case, a parent who is mentally incompetent must appear by a guardian ad litem appointed by the court." (*In re James F.* (2008) 42 Cal.4th 901, 910; see *In re Sara D.* (2001) 87 Cal.App.4th 661, 667.) "The test is whether the parent has the capacity to understand the nature or consequences of the proceeding and to assist counsel in preparing the case." (*In re James F., supra,* at p. 910; *In re Sara D., supra*, at p. 667; *In re Jessica G.* (2001) 93 Cal.App.4th 1180, 1186.) The mere existence of a mental illness or disability does not compel appointment of a guardian ad litem. There must be evidence that the mental illness or disability affects the party's ability to understand the proceeding and assist counsel. (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1367-1368.) "Error in the procedure used to appoint a guardian ad litem for a parent in a dependency proceeding is trial error that is amenable to harmless error analysis rather than a structural defect requiring reversal of the juvenile court's orders without regard to prejudice." (*In re James F., supra*, p. 915.)

The mother did not challenge the failure to appoint a guardian ad litem at the outset of this dependency in her prior appeal from the judgment of disposition and has forfeited the issue. (*John F. v. Superior Court* (1996) 43 Cal.App.4th 400, 404-405.) The mother contends the issue is not forfeited, relying on the decisions in *In re M.F.* (2008) 161 Cal.App.4th 673, 682, and *In re A.C.* (2008) 166 Cal.App.4th 146, 156. These cases are factually distinguishable. In *M.F.*, the parent was a minor and in *A.C.*, the father was a conservatee. In each case,

appointment of a guardian ad litem was required due to each parent's status as a legal incompetent. No inquiry or further evidence was necessary to establish their inability to understand the proceedings and to assist counsel. Further, there was no prior review in either case and the courts reasoned forfeiture was inappropriate under the circumstances. The same cannot be said here where the mother is presumed competent absent further information and experienced appellate counsel had the opportunity to fully review the record and raise the issue in the prior appeal.

Assuming arguendo the issue is not forfeited or that the issue can be narrowed to apply only to the hearing from which the appeal is taken, the mother cannot prevail. Although the existence of the mother's mental illness and cognitive impairment was well known to the court and counsel from prior dependency proceedings with the child's siblings, there is no suggestion in the record that the mother lacked capacity to understand the current proceedings or was unable to assist counsel. The record shows that a guardian ad litem was required for the mother in a prior dependency, when she was not taking her medications. However, at the time the current petition was filed, the mother was compliant with her medication regimen which controlled her mental illness. While we assume that the cognitive impairment aspect of her mental health issues remained, there is nothing which suggests that the impairment prevented her from assisting counsel. The mother testified at the selection and implementation hearing and was able to

understand and respond to counsel's questions. The court observed her demeanor. No one suggested at that time that a guardian ad litem should be appointed. The juvenile court did not err in failing to appoint a guardian ad litem for the mother.

II.

The father argues the court erred in failing to find that termination of parental rights would be detrimental to the child because he had visited regularly and the child would benefit from continued contact with him.

At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must choose one of the several "'possible alternative permanent plans for a minor child. . . . *The permanent plan preferred by the Legislature is adoption*.' If the court finds the child is adoptable, it *must* terminate parental rights absent circumstances under which it would be detrimental to the child." (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368, citations omitted, original emphasis.) There are only limited circumstances which permit the court to find a "compelling reason for determining that termination [of parental rights] would be detrimental to the child." (§ 366.26, subd. (c)(1)(B).) The party claiming the exception has the burden of establishing the existence of any circumstances which constitute an exception to termination of parental rights. (*In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1373; *In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252; Cal. Rules of Court, rule 5.725(e)(3); Evid. Code, § 500.)

One of the circumstances in which termination of parental rights would be detrimental to the minor is: "The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).) The benefit to the child must promote "the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th, 567, 575.) Even frequent and loving contact is not sufficient to establish this benefit absent a significant positive emotional attachment between parent and child. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419; *In re Teneka W.* (1995) 37 Cal.App.4th 721, 728-729; *In re Brian B.* (1991) 2 Cal.App.4th 904, 924.)

The evidence before the court was that appellants had visited regularly; however, both needed redirection to interact appropriately with the child. The father continued his controlling behavior, ignoring the child's wants and needs. The child was not excited to see appellants and occasionally wanted

to leave visits early. The evidence did not establish the existence of a significant positive relationship between appellants and the child. As far as the child was concerned appellants were, at best, friendly visitors. The juvenile court did not err in concluding termination of parental rights would not be detrimental to the child.

DISPOSITION

The orders of the juvenile court are affirmed.

CANTIL-SAKAUYE, J.

We concur:

NICHOLSON, Acting P. J.

RAYE, J.